



STEVEN L. BESHEAR
Governor

FINANCE AND ADMINISTRATION CABINET
DEPARTMENT OF REVENUE
501 HIGH STREET
FRANKFORT, KENTUCKY 40620
Phone (502) 564-3226
Fax (502) 564-3875
www.kentucky.gov

LORI HUDSON FLANERY
Secretary

THOMAS B. MILLER
Commissioner

In the matter of:

[REDACTED] Inc.

Contact: [REDACTED]

FINAL RULING NO. 2015-51
December 2, 2015

Sales and Use Tax refund claim denial
for the periods September 1, 2005 through February 28, 2010

FINAL RULING

The Kentucky Department of Revenue ("DOR") has denied a refund claim submitted by [REDACTED] Inc. ("Pittsburg"). The pertinent amount of the refund claim and the period to which it relates is set forth below. The Department's denial of the refund claim has been protested in accordance with KRS 131.110 and 103 KAR 1:010. *See* KRS 134.580(3).

Period	Tax	Interest as of 12/02/2015	Totals
09/01/2005 - 02/28/2010	(\$ [REDACTED])	(\$ [REDACTED])	(\$ [REDACTED])
TOTAL	(\$ [REDACTED])	(\$ [REDACTED])	(\$ [REDACTED])

[REDACTED] builds and installs water and fuel tanks as well as television towers both inside and outside of Kentucky.

In 2009, ██████████ underwent a sales and use tax audit resulting in a sales and use tax assessment of \$ ██████████. ██████████ promptly paid the assessment with interest in June 2009 without protest. During its preparation for a subsequent audit by DOR in August of 2014, ██████████ claims to have discovered an error its own staff allegedly made in the filing of its sales and use tax returns during several months of the prior audit period. ██████████ thereafter submitted a refund claim on ██████████ 2014 for the periods September, 2005 through February, 2010. It is undisputed that this refund claim is untimely under KRS 134.580, which governs sales and use tax refund claims. KRS 139.770(1).

The following is stated in KRS 134.580(3) and (5):

(3) No refund shall be made unless each taxpayer individually files an application or claim for the refund within four (4) years from the date payment was made.

* * * *

(5) Nothing in this section shall be construed to authorize the agency to make or cause to be made any refund except within four (4) years of the date prescribed by law for the filing of a return including any extension of time for filing the return, or the date the money was paid into the State Treasury, whichever is the later, except in any case where the assessment period has been extended by written agreement between the taxpayer and the department, the limitation contained in this subsection shall be extended accordingly.

These statutory provisions are unambiguous in barring ██████████'s refund claim. All of the periods embraced by this refund claim are beyond the four year period specified in KRS 134.580 as the deadline for seeking sales and use tax refunds.

The right to a tax refund is a matter of legislative grace and the procedure prescribed by the General Assembly for obtaining a refund must be strictly followed. *Revenue Cabinet v. Gossum*, 887 S.W.2d 829 334 (Ky. 1994); *Department of Conservation v. Co-De Coal Co.*, 388 S.W.2d 614, 615 (Ky. 1964); *Hurry Up Broadway Co. v. Shannon*, 267 Ky. 304, 102 S.W.2d 30 (1937). Compliance with the time requirement imposed by KRS 134.580(3) and (5) is a condition precedent to any right to a refund of sales and use tax. *Co-De Coal*, 388 S.W.2d at 617 (“whereas a statute of limitations neither creates nor extinguishes any rights, but merely places a limitation upon the remedy (which can be waived or tolled), a limitation such as the one in question is a condition precedent to the existence of the right”).

Moreover, this matter implicates the doctrine of sovereign immunity. *Beshear v. Haydon Bridge Co.*, 416 S.W.3d 280, 296 (Ky. 2013); *Department of Revenue v. Jack Coal Co.*, 474 S.W.2d 70 (Ky. 1972); *Co-De Coal*, 388 S.W.2d at 616-17. Only the General Assembly can authorize or consent to the claim asserted by ██████████ here. *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997); *Department of Corrections v. Furr*, 23 S.W.3d 615, 616 (Ky. 2000); *Commonwealth, Dept. of Highways v. Davidson*, 383 S.W.2d 346, 348 (Ky. 1964). As described above, ██████████ has admittedly failed to satisfy the requirements of the waiver of sovereign immunity applicable to this situation set forth in KRS 134.580.

██████████ has offered nothing that can overcome the plain and unambiguous language of KRS 134.580 and the undisputed fact of its untimely submission of its refund claim. It invokes “the doctrine of fraudulent concealment” recognized in a civil action for damages for conversion of coal after severance. The court decision ██████████ has cited in support of its position dealt with a situation where the defendant wrongfully extended a mine under the land of the plaintiff to extract minerals from an opening some distance away from the plaintiff’s property. The plaintiff consequently had no visible way of knowing that the mining was going on. *Falls Branch Coal Co. v. Proctor Coal Co.*, 203 Ky. 307, 262 S.W. 300, 304-05 (1924). The court held that in these particular circumstances, the statute of limitations would not begin to run to bar the plaintiff’s claim. ██████████’s situation here presents an entirely different set of circumstances. Here, the relevant records have at all times been available to ██████████ to review and verify. Any alleged error could have been brought to light in a timely manner through the exercise of reasonable diligence. *Id.*; *Johnson v. Fetter*, 224 Ky. 788, 7 S.W.2d 241, 246 (1928).

Thus, even if ██████████ could clear the hurdle presented by the plain and unambiguous language of KRS 134.580, there has been no showing of any “fraudulent concealment” practiced here. The audit was based upon ██████████’s own records and ██████████ remained in possession of these records, which it in fact used to submit the untimely refund claim at issue. At any point during the four years after it paid the taxes whose refund it now seeks, ██████████ could have re-examined the audit and its sales and use tax reporting and filed a refund claim that was *timely* under KRS 134.580. It failed to do so and that is one of the unfortunate facts of life in this context. The Department is likewise subject to a similar contingency, when it fails to make a timely *assessment* of additional tax in accordance with KRS 139.620(1).

Finally, even if the refund claim is not barred as untimely under KRS 134.580, KRS 139.770(3) prohibits the DOR’s issuance of any refund to the extent ██████████ collected the taxes in question from its customers. In that event, ██████████ would have needed to refund the tax collected from those customers, which it has not done here.

Based upon the foregoing, and the information supplied as part of or in connection with ██████████, Inc.'s protest and supporting statement, the sales and use tax refund has been properly denied.

This letter is the final ruling of the Department of Revenue.

APPEAL

You may appeal this final ruling to the Kentucky Board of Tax Appeals pursuant to the provisions of KRS 131.110, KRS 131.340-131.365, 103 KAR 1:010 and 802 KAR 1:010. If you decide to appeal this final ruling, your petition of appeal must be filed at the principal office of the Kentucky Board of Tax Appeals, 128 Brighton Park Boulevard, Frankfort, Kentucky 40601-3714, within thirty (30) days from the date of this final ruling. The rules of the Kentucky Board of Tax Appeals, which are set forth in 802 KAR 1:010, require that the petition of appeal must:

1. Be filed in quintuplicate;
2. Contain a brief statement of the law and facts in issue;
3. Contain the petitioner's or appellant's position as to the law and facts; and
4. Include a copy of this final ruling with each copy of the petition of appeal.

The petition of appeal must be in writing and signed by the petitioner or appellant. Filings by facsimile or other electronic means shall not be accepted.

Proceedings before the Kentucky Board of Tax Appeals are conducted in accordance with 103 KAR 1:010, 802 KAR 1:010 and KRS 131.340-131.365 and KRS Chapter 13B. Formal hearings are held by the Board concerning the tax appeals before it, with all testimony and proceedings officially reported. Legal representation of parties to appeals before the Board is governed by the following rules set forth in Section 3 of 802 KAR 1:010:

1. An individual may represent himself in any proceedings before the Board where his individual tax liability is at issue or he may obtain an attorney to represent him in those proceedings;
2. An individual who is not an attorney may not represent any other individual or legal entity in any proceedings before the Board;
3. In accordance with Supreme Court Rule 3.020, if the appealing party is a corporation, trust, estate, partnership, joint venture, LLC, or any other artificial legal entity, the entity must be represented by an attorney on all matters before the Board, including the filing of the petition of appeal. If the petition of appeal is filed by a non-attorney representative for the legal entity, the appeal will be dismissed by the Board; and

4. An attorney who is not licensed to practice in Kentucky may practice before the Board only if he complies with Rule 3.030(2) of the Rules of the Kentucky Supreme Court.

You will be notified by the Clerk of the Board of the date and time set for any hearing.

Sincerely,

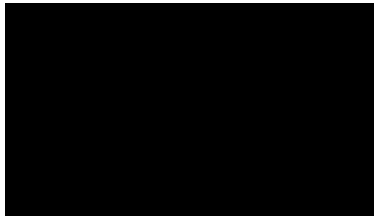
DEPARTMENT OF REVENUE

Bethany Atkins Rice

Attorney Manager
Office of Legal Services for Revenue

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

cc:



LLP